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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

No. 704

CRAIG SIEGFRIED, ETC.,
Petitioner,

vs.

THE KANSAS CITY STAR COMPANY, a Corporation,
and EMIL A. SEES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

RAY D. JONES, JR.,
CARROL C. KENNETT,
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Kansas City 12, Missouri,
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TABLE OF CONTENTS

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit	1
Constitutional Amendment Involved	2
Opinions Below	2
Jurisdiction	2
Question Presented	3
Statement of the Case	3
Reasons for Granting the Writ	7
The Court of Appeals has now approved a device whereby a Trial Judge can limit a plaintiff to nominal damages in an anti-trust suit by his own finding of fact, and have it sustained as a jury finding.	
Conclusion	9
Appendix A—Opinion Below	A1
Appendix B—Judgment Below	A17
Appendix C—Interrogatories to Be Answered by the Jury	A18

Table of Authorities

CONSTITUTIONAL AMENDMENT CITED

Amendment VII	2

FEDERAL RULES OF CIVIL PROCEDURE CITED

Rule 38(a), Federal Rules of Civil Procedure	2

CASE CITED

Kansas City Star Co. v. United States, 240 F.2d 643 (C.A. 8, 1957), Certiorari denied 354 U.S. 923 (1957)	3

STATUTES CITED

15 U.S.C., Sec. 15	3
28 U.S.C., Sec. 1254 (1)	3

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Craig Siegfried, as a sole proprietor and as a partner in the Blue Valley Company, a partnership composed of Craig Siegfried, Cedric Siegfried, Charles M. Siegfried and Frank E. Fowler, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above en-

titled cause on January 9, 1962, and set out in Appendix B of this petition (*infra*, p. A17).

CONSTITUTIONAL AMENDMENT INVOLVED.

The Constitutional right involved is Amendment VII to the Constitution of the United States, which provides as follows:

> "In Suits at Common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the Common law."

This Constitutional right is reasserted in Rule 38 (a), Federal Rules of Civil Procedure, which provides:

> "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."

CITATIONS TO OPINIONS BELOW.

The opinion of the District Court for the Western District of Missouri (R. 47), is reported in 193 F. Supp. 427. The opinion of the Circuit Court of Appeals, printed as Appendix A hereto, *infra*, p. A1, is not yet reported in the Federal Reporter.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on January 9, 1962. Appendix B, *infra*, p. A17.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTION PRESENTED.

Was petitioner denied his clear Constitutional right to trial by jury on all issues of the case where the Court used special interrogatories, which the jury answered all in favor of the petitioner, and when the jury asked the Court what amount could be awarded petitioner, the Court took the case from the jury by instructing them they could either bring in one dollar damages or enter the word "speculative", and the jury, having made a positive finding that petitioner's revenues were substantially reduced or retarded, refused to find that petitioner was damaged only one dollar, and entered the only answer to the damage question that they could enter as directed by the Court, *i. e.*, "Speculative", and the Court then sat as a jury and found as a fact that petitioner was damaged in only the sum of one dollar?

STATEMENT.

The case was for treble damages brought under Sec. 4 of the Clayton Act, 15 U.S.C. 15. The respondents are convicted monopolists, *Kansas City Star Company* v. *United States*, 8 Cir., 240 F.2d 643. Petitioner was a competing publisher and radio station operator within the scope of the monopoly. The jurisdiction of the District Court was invoked because the case arises under the Sherman and Clayton Acts.

The case was tried to a jury, and the only issue contested by the respondents upon the trial was the amount

of damages (Appendix A, *infra*, p. A5). The case was submitted to the jury on general forms of verdict.

At the regular evening recess time the jury was called in and (R. 336):

> The Court: Mr. McCall, have you reached a verdict in this case?
>
> Foreman McCall: Not yet, Your Honor.

Court was then recessed until 10 o'clock the following morning. The next morning the following was had in open Court (R. 338):

> The Court: Mr. McCall, last evening you stated to me that you had not reached any verdict in the case, and I understand from that that you do not have a unanimous opinion with reference to any of the issues that you were considering. Is that correct?
>
> Foreman McCall: That is correct.
>
> The Court: In the light of that fact I am going to see if I can relieve your labors a little bit by submitting to you, instead of the forms of verdict that were given to you last evening, special interrogatories for you to answer. I think in making answer to those interrogatories that you can have in mind the ultimate facts which the jury is to pass upon and determine, and that your determination, of course, will guide the Court with reference to the law applicable to those facts. So instead of forms of verdict that you considered yesterday, I am giving to you now these additional instructions. They are interrogatories to be answered by the jury.

That afternoon the jury returned into open Court and the following was had (R. 348):

> The Court: Mr. McCall, Miss Bucklew, and gentlemen, you have sent a note to the Court stating, "Are there any instructions which you may properly

give us to enable us to arrive at a basis to be used in determining the amount of damage?"

The Court then re-read portions of his original charge and then embellished it as follows (R. 355):

> "But really there is no evidence in this record from which I, as a judge, can ascertain that amount of damages that would reasonably be recovered by the plaintiffs in this case with any reasonable degree of certainty."
>
> * * *
>
> "Now, * * * if you find that the plaintiffs were injured in any one of their business operations by reason of the monopoly * * *, you may either put down the sum of one dollar or you may write in the word 'speculative'. * * *
>
> If you do that, then there are questions of law which that will indicate to the Court to pursue under the law. That would be an aid to the Court in this case."

The following proceedings were then had in Court chambers, out of the presence of the jury (R. 356):

> The Court: Let the record show—don't pass this around, that is the reason I didn't read the whole note. The note from the jury is: "We are in agreement as to all questions except those questions pertaining to the amount of damages. Are there any instructions which you may properly give us to enable us to arrive at a basis to be used in determining the amount of damages? Charles F. McCall."

It is therefore very vivid that when the Court gave his last charge and came up with the term "speculative" as a jury finding, he knew that the jury had already made a positive finding of substantial damages (Appendix C, *infra*, p. A21).

Shortly thereafter the jury returned into open Court and the following transpired (R. 357):

> The Court: Mr. McCall, have you now reached a verdict in the case?
>
> Foreman McCall: Yes.
>
> The Court: Just pass it to the Clerk.

The verdict contained the word "speculative" as answer to the questions on amount of damages (Appendix C, *infra*, p. A20).

The Court then addressed the jury (R. 358):

> The Court: I think it is a very fine verdict for you to return and it will be a verdict from which the Court can make applications of law. It gives to me a pattern from which to finally determine this case. Of course there will be other matters that will be submitted to the Court, notwithstanding your verdicts here, but it will give me a pattern, and your thoughts are very, very helpful.

Following the filing of motions and suggestions the Court, on March 1, 1961, filed his Memorandum and Order (R. 47, 193 F. Supp. 427) wherein he "finds the fact to be" that plaintiffs are only entitled to recover nominal damages in this case (R. 71, l.c. 438 of 193 F. Supp.).

Upon appeal, the Court of Appeals for the Eighth Circuit affirmed the judgment (Appendix B, *infra*, p. A17) and approved the device used by the Trial Court to limit petitioner to nominal damages and lay it at the feet of the jury, when he would not so rule as a matter of law, when the appellate Court held (Appendix A, *infra*, p. A9) that:

> "The Court gave the jury complete, fair and remarkably clear instructions upon all the issues presented by this litigation. * * *"

In its opinion, the Court of Appeals further held as follows (Appendix A, *infra*, p. A9).

> "We accept the plaintiff's view that under the Seventh Amendment and Rule 38(a) of the Federal Rules of Civil Procedure, he is entitled to a jury trial upon all material fact issues presented by his complaint. We reject plaintiff's contention that he has not in fact had a fair jury trial upon the issue of the amount of damages."
>
> "Plaintiff has not been denied a jury trial on the damage issue."

* * *

The answer is that the jury, not the Court, made the finding that plaintiff had not established his right to recover substantial damages* (p. A11, of Appendix A, *infra*).

REASONS FOR GRANTING THE WRIT.

The Court of Appeals for the Eighth Circuit has now approved a device whereby a Trial Judge can limit a plaintiff to nominal damages in an anti-trust suit by his own finding of fact, and have it sustained as a jury finding.

If this Court does not review this procedure, then it will have put its stamp of approval on the holding of the Court of Appeals for the Eighth Circuit, and any Trial Judge can deprive any plaintiff of a complete jury trial on the issue of how much damages to award by directing them to write in the word "speculative" whenever the jury shows any signs of disagreement on the amount.

---

*But see the jury's answers to interrogatories under (7) at p. A19 of Appendix A, *infra*.

Whether or not this petitioner is ever awarded more than one dollar in damages in this case is of no great public concern, but it should be of great concern to every future litigant who finds himself in the Federal Courts that there is an approved device whereby he can be deprived of a positive and definite jury finding of the amount of damages he is entitled to receive, whether that amount be great or small. It should be of particular concern to litigants who have been damaged by violations of the anti-trust laws, since the more recent decisions reflect a trend of conservatism and reluctance by the Federal Courts in awarding, and in the sustaining of awards of, substantial amounts of damages to successful plaintiffs in Civil anti-trust cases.

The Court of Appeals for the Eighth Circuit has approved the Trial Court's instructions and directions to the jury as a model for anti-trust cases. If this decision is allowed to stand, then every Court in the country with a Civil anti-trust case before it can instruct the jury to find the plaintiff's damages are "speculative" and take care of the damage question himself.

The right to bring these suits was given to the public by the Congress. In light of the actions of the Trial Court in this case, approved by the Court of Appeals for the Eighth Circuit, it appears that an indifferent or unfriendly attitude has permeated the Civil anti-trust field with a philosophy hostile to that reflected in the legislation, resulting in a subtle erosion of the Constitutional right to trial by jury.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

RAY D. JONES, JR.,
CARROL C. KENNETT,
Counsel for Petitioner.

Dated: January , 1962.

APPENDIX

APPENDIX A.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT.

No. 16,802

Craig Siegfried as a sole proprietor and as a partner in The Blue Valley Company, a partnership composed of Craig Siegfried, Cedric Siegfried, Charles M. Siegfried and Frank E. Fowler,

Appellant,

v.

The Kansas City Star Company, a Corporation, and Emil A. Sees,

Appellees.

Appeal from the United States District Court for the Western District of Missouri.

(January 9, 1962.)

Before VOGEL, VAN OOSTERHOUT and BLACKMUN, Circuit Judges.

VAN OOSTERHOUT, Circuit Judge.

Plaintiff Siegfried appeals from final judgment awarding him only nominal damages upon each of the four counts of his complaint wherein he sought to recover for loss of profits alleged to have been caused by defendants' violation of anti-trust laws. Defendants are The Kansas City Star Company which publishes the Kansas City Star each even

ing and on Sunday and the Kansas City Times each morning except Sunday, and owns and operates radio station WDAF and television station WDAF TV, in Kansas City, Missouri; and Emil A. Sees, director of advertising and treasurer of The Kansas City Star Company.

The period for which damages are asked runs from January 7, 1950, to December 12, 1957. Plaintiff during all of such period owned and operated a publishing business which published and distributed the Pictorial Shopper, primarily a throw-away advertising circular, and The Independence Daily News, a daily newspaper published Monday through Friday and on Sunday. From January 1, 1953 to December 12, 1957, plaintiff was the sole owner of radio station KIMO, located in Independence, Missouri. From 1947 to 1953 he owned said station jointly with three associates.

Count I relates to plaintiff's claim for loss of profits in his operation of The Independence Daily News. Count II relates to loss of profits in the Pictorial Shopper operation. Count III involves loss in the operation of radio station KIMO by the plaintiff and his associates prior to 1953. Plaintiff's associates have not appealed from the judgment. Count IV relates to plaintiff's operation of KIMO as sole owner for the period subsequent to 1953.

Plaintiff's cause of action is based upon Section 4 of the Clayton Act, 15 U.S.C.A. § 15. Plaintiff asserts that he suffered damages principally through the loss of profits in his business enterprises above described by reason of monopolization by The Kansas City Star Company of interstate trade and commerce in the dissemination of news and advertising in metropolitan Kansas City which includes Independence, Missouri, the seat of the plaintiff's operations, and by the attempt of both defendants to so monopolize

It is established that both the defendants were by indictment charged with violation of Section 2 of the Sherman Act, 15 U.S.C.A. § 2, for monopolizing and attempting to monopolize the dissemination of news and advertising in the Kansas City area for the period from January 7, 1950, to January 6, 1953. The corporate defendant was found guilty of monopolizing and both defendants were found guilty of attempting to monopolize. The facts relating to that criminal case including those showing the scope of the monopoly activity are fully set out in our opinion affirming the conviction. *Kansas City Star Co. v. United States*, 8 Cir., 240 F.2d 643.

While the period involved in this case extends considerably beyond the period covered by the indictment, and while defendants claim that certain of their practices now claimed to be monopolistic were not included in the criminal case, it is clear as shown by defendants' briefs and the trial court's reported opinion, 193 F. Supp. 427, 428-9, that the main thrust of the defense in the present case is that the *plaintiff has not established that he suffered any substantial damage by reason of the monopoly or attempt* to monopolize. *In any event, if the judgment appealed from which limits damages to nominal damages is affirmed upon the basis that plaintiff is entitled to no more* than *nominal damages*, further exploration of the scope of the monopolization is unnecessary.

This case was tried to a jury. At the close of the plaintiff's evidence and again at the close of all of the evidence defendants moved for a directed verdict upon each count of the complaint, urging among other things that the evidence does not afford any reasonable basis for estimating the damage claimed and that there is not sufficient competent evidence to establish either the fact or amount

of damage. Judge Ridge overruled these motions, stating in part:

> "[W]hat happens—what the jury does will be something for me to consider later on. I agree with you there is contradiction throughout the case on every issue in the case, and I am very skeptical as to whether or not they have proved any substantial damage with reference to any one of the counts in the case."
>
> . . . .
>
> "[I]f the jury brings in much over one dollar in respect to any one of the counts, I will review their verdict on after trial motions and determine then whether or not they have made a submissible case with reference to the question of damages."

Defendants contend upon this appeal that they are entitled to a directed verdict determining that plaintiff has failed to prove substantial damage. As the trial court indicated, defendants' right to such directed verdict presents a close question. *However, like the trial court, we find no inconsistencies between the (special verdicts) and the judgment entered*; hence we forego consideration of the directed verdict issue.

The court gave the jury very complete, fair and carefully prepared instructions upon all of the issues presented by this case and on the afternoon of December 7, 1960, submitted the case to the jury on general forms of verdict. After the jury had deliberated some two hours, they were sent home for the night. The following morning the court called counsel into chambers and furnished them with copies of forms of special verdicts he proposed to submit to the jury in place of the general verdicts. The court *afforded counsel adequate opportunity to examine and except to the special verdict forms*. Plaintiff excepted

to the special verdicts upon the ground that such submission was not timely and that the court failed to include a special verdict on his claim as to increased cost of circulation caused by defendants' failure to permit its contract carriers to deliver plaintiff's papers.

Thereupon the court called the jury back to the courtroom ascertained that the jury had not reached a unanimous decision upon any of the issues they were considering, and the court thereupon withdrew from the jury's consideration the general verdict forms and submitted special verdicts for the jury to answer. Such special verdicts, together with the jury's ultimate answers thereto, appear in full in the trial court's opinion, pages 439, 40, 193 F. Supp.

At 3:50 p. m., on the same day, the jury sent a note to the court reading:

> "We are in agreement as to all questions except those questions pertaining to the amount of damages. Are there any instructions which you may properly give us to enable us to arrive at a basis to be used in determining the amount of damages?"

The jury was brought back to the courtroom. The court repeated its instructions upon damages previously given, then gave the additional instructions appearing at pages 437-8 of 193 F. Supp., concluding as follows:

> "Now in view of the form of verdict I have given to you, if you find the plaintiffs were injured in any one of their business operations by reason of the monopoly, but you cannot ascertain the amount of it, you may either put down the sum of one dollar or you may write in the word 'speculative.'"

Thereafter, at 4:30 p. m., the jury returned into court and reported it had reached a verdict. The verdict was read, accepted and filed. The jury answered the questions

propounded by each of the special verdicts, answering the question pertaining to the amount of damages with the word "speculative". The findings of the jury upon the special verdicts are well summarized by Judge Ridge as follows:

> "Shred of all superfluity, by the jury verdict returned herein, a die has been cast which molds the following ultimate facts once at issue as having been finally adjudicated: (1) During the period from January 7, 1950, through December 12, 1957, the defendant The Kansas City Star Company possessed monopoly power which it used to control and dominate interstate trade and commerce in the dissemination of news and advertising; (2) and, with Emil A. Sees, it attempted to monopolize the dissemination of news and advertising in the metropolitan area of Kansas City, Missouri, as a consequence of such power; (3) such monopoly, and attempt to monopolize, were a proximate cause of injury to the plaintiffs in their operation of The Pictorial Shopper, The Independence Daily News, and Radio Station KIMO; (4) however, such monopoly power and attempt to monopolize did not substantially reduce and retard the circulation of either The Independence Daily News, or The Pictorial Shopper; (5) but did substantially reduce and retard the advertising revenue of both of those publications, as well as that of Radio Station KIMO; (6) however, the amount thereof, measured in dollars and cents, was 'speculative.' ('Substantially' as above used is synonymous with 'materially.')" 193 F. Supp. 430.

After receiving the special verdicts, the court invited counsel to file motions as to what form of judgment, if any, should be entered on the special verdicts. Plaintiffs responded by urging the court to grant a new trial upon all issues, contending that the jury's findings on the issue of the amount of damages constituted no finding at all, and that the court if it entered a judgment would be de-

priving plaintiff of his constitutional right to have his damages determined by a jury. In the alternative, plaintiff moved to have a new trial on the issue of damages and upon all issues not specifically submitted to the jury by the special verdict forms.

Defendants' position is that the special verdicts reflect that the jury found that the plaintiff had not met his burden of proof to establish substantial damages; that the verdicts determined that the plaintiff was not entitled to recover anything more than nominal damages and that judgment should be entered for nominal damages in accordance with the special verdicts. The court entered judgment in favor of the plaintiff for $1.00 upon each of the four counts, which damages were trebled pursuant to 15 U.S.C.A., § 15, making a total judgment in favor of the plaintiffs in the amount of $12.00. Plaintiff took this timely appeal from such judgment.

Judge Ridge, in a well-considered memorandum opinion, 193 F. Supp. 427, sets out his views of the law, the issues, and makes an excellent summary of plaintiff's evidence upon the issue of damages. We have carefully read the record in this case and consider the trial court's summary of the evidence to be fair and complete. The parties are entirely familiar with the evidence. No point would be served by our discussing the rather extensive evidence in detail. We adopt the trial court's summary of the evidence as our own.

Plaintiff thus summarizes the points he relies upon for a reversal:

> "I. Plaintiff was denied his clear Constitutional right to trial by jury on every issue of the case, when the Court received a verdict and discharged the jury when the jury had failed to assess and name the amounts of plaintiff's damages in the verdict.

II. Plaintiff was denied his clear Constitutional right to trial by jury on every issue of the case when the Court, after receiving a verdict wherein the amounts of plaintiff's damages had not been assessed and named, discharged the jury and thereafter made findings of fact on the issue of amounts of damages and assessed and named the amounts of damages himself.

III. a. Even if the Court had authority to sit as a jury, to make findings of fact and name the damages, he was in error in holding the record as made by plaintiffs did not afford a basis for ascertaining the amount of damages sustained by the plaintiff.

b. The Court was farther in error in instructing the jury that they must find the amounts of plaintiff's damages to a reasonable certainty.

IV. The credibility of the witnesses and the weight and value to be given their testimony was a matter for the jury.

V. Plaintiff was prejudiced by the action of the Court in submitting special interrogatories to the jury, with no advance notice to plaintiff's Counsel, and after the case had been argued and had gone to the jury under a broad and comprehensive charge."

We shall discuss such points in the order stated.

I and II

Points I and II raise the issue that plaintiff was deprived of his Constitutional right to a jury trial upon material issues raised by his complaint, and especially with respect to his right to have the jury determine the amount of his damage. In Point I plaintiff urges that since the blanks in the special verdict fixing the amount of damage were filled in with the word "speculative", this amounted to no verdict at all and that the court should have refused to accept such verdict, and should have sent the jury back to determine the amount of plaintiff's damages in dollars

and cents. Point II is based upon the premise of Point I, that the jury in effect returned no verdict as to damages and that consequently the court usurped the function of the jury in fixing the damages in the sum of $1.00 upon each count.

We accept the plaintiff's view that under the Seventh Amendment and Rule 38(a) of the Federal Rules of Civil Procedure, he is entitled to a jury trial upon all material fact issues presented by his complaint. (We reject plaintiff's contention that he has not in fact had a fair jury trial upon the issue of the amount of damages.)

The court gave the jury complete, fair and remarkably clear instructions upon all the issues presented by this litigation, including some eight pages treating the damage issue, such instructions including the following:

> "If the fact of damage is shown to exist by a preponderance of the evidence and the amount of damage is left in conjecture, speculation or surmise, then plaintiffs can only recover nominal damages, i. e. $1.00, or *some other modest sum*"

When the jury came to the court for further aid to enable them to determine damages, the court re-read its damage instructions and gave the jury additional instructions hereinabove referred to and set out in part. There is also included in the court's additional instructions the following:

> "If you write in the word 'speculative' all of you agree among yourselves whether that is the state in which you are left by reason of the proof in the case.

> "If you do that, then there are questions of law which that will indicate to the Court to pursue under the law. That would be an aid to the Court in this case. If you are left in that state of mind and you can't ascertain the amount of damages and you think that it is speculative, either write the sum of one

> dollar or put the word 'speculative' so that the Court will have an indication of what your collective mind is with reference to that particular subject."

It seems clear to us from the court's instructions as a whole, including the supplemental instructions, that the *court in effect instructed the jury that if they found that the plaintiff had not met the burden of proving any ascertainable actual damages they should allow the plaintiff only nominal damages and that such verdict could be expressed by filling in the blanks provided for the amount of the verdict with the words "$1.00" or "speculative"*, and that the jury so understood the court's instructions, and that the jury by filling in the amount blanks with the word "speculative" expressed their collective view that plaintiff was entitled to no substantial damages but only to nominal damages.

It appears from plaintiff's exception to the additional instructions on damages that he also understood the instructions. Such exception reads:

> "The plaintiffs wish to object and except to the additional oral instructions given by the Court to the jury, in that it invades the province of the jury, having the effect of directing the jury in the amount of damages to return on each count of the plaintiffs' petition, that amount being one dollar."

We conclude that the jury's special verdicts reflect their decision that the plaintiff was entitled to only nominal damages. *Thus the court in entering judgment for $1.00 trebled, on each count was only entering judgment on the special verdicts* of the jury. Plaintiff's claim that the court usurped the function of the jury and fixed the amount of damages independently of the verdicts is without merit. *Plaintiff has not been denied a jury trial on the damage issue.*

III.

Plaintiff contends that even if the court had authority to fix the amount of damages, there is no evidentiary basis for a finding that plaintiff failed to produce proof whereby the jury could have made a reasonable estimate of the amount of damages. *The answer is that the jury, not the court, made the finding that plaintiff had not established his right to recover substantial damages.* It is true that the court was of the view that the plaintiff had not offered evidence from which the amount of damages could be reasonably estimated, but the court submitted the issue of damages to the jury and received their answer that such damages were speculative. *Since the jury determined upon the basis of all the evidence that plaintiff was not entitled to substantial damages, we see no need for passing upon defendants' motion for a directed verdict on the substantial damage issue.* In any event, the evidence on damages, so well summarized in the trial court's opinion, affords a reasonable basis for the jury as a fact-finder to reach a permissible conclusion that the plaintiff is entitled to no substantial damages.

Plaintiff further asserts that the court erred in instructing that the jury must find plaintiff's damages to a reasonable certainty. In making this point, plaintiff has not complied with our Rule 11 (b) Third, which requires setting out the portion of the instruction objected to and the exception made thereto. The record discloses that plaintiff objected to the portion of the damage instruction placing the burden on him "to go forward and ascertain those damages with exactness" and also excepted as follows:

> "And we submit that the Court erred when he submitted that where the fact of damage is established the jury cannot speculate as to the measure of damages, as we believe the proper rule of law is that you cannot speculate as to the fact of damage, but where the fact

of damage has been established you can speculate the amount if there is either raw evidence or a sufficient basis of measurement."

It is apparent that the objection now raised is somewhat different from that raised in the trial court, and hence the criticism of the instructions now made is not properly before us for consideration.

It is quite true that where the fact of damage has been established, some liberality exists in the determination of the amount of damages. This is recognized repeatedly by the trial court in its extensive instructions and in its opinion. See pages 429, 430-36 of 193 F. Supp. The trial court, at page 436, states:

> "[T]here is not one iota of testimony from Mr. Siegfried, any expert witness, or any other source, as to the probable amount of advertising Siegfried might, or could, reasonably have lost or received from such advertisers but for the monopoly or attempt to monopolize adjudicated. The jury in this case was not given any measuring rod concerning that matter, but was invited by plaintiffs to merely guess and fix the quantum of damages from that source.
>
> "It has long been recognized that though the amount of anticipated profits, dependent as they are upon numerous and uncertain contingencies, is not susceptible of proof with certainty, but that fact, standing alone, does not prevent recovery thereof, if there is evidence from which a jury may reasonably estimate, though not exactly, the amount thereof."

There must be some evidentiary basis to support an inference as to loss of net profits. A damage verdict may not be based upon speculation and guesswork alone. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264; *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273

U.S. 359, 379; *Central Coal & Coke Co. v. Hartman*, 8 Cir., 111 Fed. 96; *Clapper v. Original Tractor Cab Co.*, 7 Cir., 270 F.2d 616, cert. denied 361 U.S. 967; *Flintkote Co. v. Lysfjord*, 9 Cir., 246 F.2d 368, 393, cert. denied 355 U.S. 835; *Fireside Marshmallow Co. v. Frank Quinlan Candy Co.*, 8 Cir., 213 F.2d 16, 18.

While the damage instructions given the jury do contain statements that damages must be proved with reasonable certainty and cannot be based solely upon speculation or guesswork; the instructions as a whole reflect that the plaintiff was not required to prove its damages to a certainty but that damages could be allowed on the basis of proof of facts from which the amount of loss of net profits may reasonably be inferred. For example, the court stated:

> "Now, the law does not require that the plaintiffs make exact proof, in dollars and cents, of the exact amount of loss of anticipated net profits claimed in an antitrust case, but it does require that a claim for loss of anticipated net profits made as a result of such a claim be sustained by proof of facts that pass the realm of conjecture, speculation, or opinion not founded on facts; and must consist of actual facts from which a reasonably accurate conclusion regarding the cause and amount of such a claimed loss can be logically and rationally drawn. In such a case, even where the defendant, by its own wrong has prevented a more precise computation of the amount of damages claimed, the jury may not render a verdict based on speculation or guesswork.
>
> "If, however, the plaintiffs have made proof of factors, or proof of facts, from which the fact of injury and the amount of loss of net profits may be reasonably inferred, in some reasonable amount, then the plaintiff is entitled to recover the amount of any such loss of net profits in an action such as this."

[illegible] on the damage issue when considered as a whole fairly state the law relating to damages.

IV

We agree with plaintiff's general statement that the credibility of witnesses and the weight to be given their testimony is for the jury to determine with respect of fact issues submitted to the jury. However this principle offers plaintiff no comfort for it is our view that credibility issues were in fact determined by the jury. In arguing this point, plaintiff stresses his business records. Records of expense and income from The Independence Daily News and the Pictorial Shopper and the job printing enterprise not involved in this litigation were all kept in one account. Plaintiff by his bookkeeper attempted to allocate the profits and expenses pertaining to each segment of plaintiff's business. Various reports submitted at different times show widely varying allocations and interpretations of the plaintiff's record. The trial court at page 435 of 193 F. Supp. sets out convincing reasons why it believes such records constitute no reasonable basis for a claim of loss of profits. The jury had this evidence before it for what it was worth.

There is likewise substantial evidence that any loss of advertising revenue might be due to causes other than monopoly. Some people did not like plaintiff's paper or its editorial policy. *The field was saturated with local papers and advertising mediums.* Plaintiff conceded that The Independence Examiner was superior to his own newspaper. There is evidence that some advertisers were absorbed by national chains which had their own advertising policies. An employee of the plaintiff commenced a rival shopper. The jury was entitled to consider this evidence and the

evidence as a whole in determining the probability of the loss of advertising revenue to the plaintiff by reason of the monopoly.

Plaintiff complains of error by reason of the submission of the special verdicts to the jury. The plaintiff had a fair opportunity to examine and object to the form of special verdict before they were submitted to the jury. The jury had reached no decision on the general verdicts when the special verdicts were substituted for the general verdicts. Rule 49(a) authorizes courts to submit cases by means of special verdict. The rule does not expressly require special verdicts to be submitted at the time the instructions are first given. In *McDonnell v. Timmerman*, 8 Cir., 269 F.2d 54, we held that under Rule 49(a) the court has a broad discretion not only as to the issue of whether or not to utilize special verdicts but also as to the matter of form of the special verdicts, and we further held the summarized form of issues *if then presented the case fairly, is a matter resting in the sound discretion of the trial judge.*

While it is perhaps somewhat unusual for the court to submit a case on special verdicts after it had been originally submitted on general verdicts, no prejudice to the plaintiff is shown by the use of such procedure here. *The record clearly shows that the jury had not agreed upon the general verdicts when the special verdicts were substituted.* Plaintiff had ample time to examine the special verdict forms, and object thereto. Plaintiff made no objection to the form of any of the special verdicts submitted. Plaintiff has failed to demonstrate that the court committed any prejudicial error in submitting this case to the jury on special verdicts.

By way of summary, we state that we have carefully examined the record and the transcript of testimony, and that we are satisfied that the plaintiff has in all respects had a fair and impartial trial. Eleven pretrial conferences were held. Plaintiff was given a full opportunity to develop and present his evidence. No question is properly before us on this appeal with relation to the admission or exclusion of any evidence. The record supports Judge Ridge's statement to the effect "if the record in this case attests to anything, it attests to the plain, clear and unqualified fact that this Court has done everything in its power to give plaintiffs and defendants every possible opportunity to marshal all evidence available to them in support of their respective theories of claim and defense for submission to the jury empaneled in this action."

Plaintiff has failed to establish that the court committed any error in entering the judgment appealed from.

The judgment is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B.

Judgment.

United States Court of Appeals.

FOR THE EIGHTH CIRCUIT.

No. 16,802. September Term 1961.

Craig Siegfried, as a sole proprietor and as a partner in The Blue Valley Company, a partnership composed of Craig Siegfried, Cedric Siegfried, Charles M. Siegfried and Frank E. Fowler,

Appellant,

vs.

The Kansas City Star Company, a Corporation, and Emil A. Sees,

Appellees.

Appeal from the United States District Court for the Western District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

January 9th, 1962.

Approved for the Court:

Clerk, United States Court of Appeals, Eighth Circuit.

APPENDIX C.

"Interrogatories to Be Answered by the Jury.

Do you find and believe from the evidence:

(1) During the period from January 7, 1950 to January 6, 1953, did The Kansas City Star Company possess monopoly power so as to control and dominate interstate trade and commerce in dissemination of news and advertising, to such an extent as to exclude actual and potential competitors from that field of interstate trade or commerce and exercise such power with the intent and for that purpose?

Answer 'Yes' or 'No' Yes

(2) The same question is propounded to you with respect to the period from January 7, 1953 to December 12, 1957.

Answer 'Yes' or 'No' Yes

(3) During the period from January 7, 1950 to January 6, 1953, did The Kansas City Star Company attempt to monopolize interstate trade and commerce in the dissemination of news and advertising for the specific purpose and with the intent to achieve or build a monopoly?

Answer 'Yes' or 'No' Yes

(4) The same question is propounded to you with respect to the period from January 7, 1953 to December 12, 1957.

Answer 'Yes' or 'No' Yes

(5) During the period from January 6, 1953, did the defendant Emil A. Sees attempt to monopolize the dissem-

ination of news and advertising in the Metropolitan Area of Kansas City for the specific purpose and with the intent to achieve or build a monopoly?

Answer 'Yes' or 'No' Yes

(6) The same question is propounded to you with respect to the period from January 7, 1953 to December 12, 1957.

Answer 'Yes' or 'No' Yes

(7) If your answer to all of the above questions is 'No', then you need not make any further answer to the following questions. If any one of your answers to the above questions is 'Yes', then make answer to the following:

Do you find and believe from the evidence that any such monopoly or attempt to monopolize, as above found by you, was a substantial and proximate cause of damage to plaintiff Craig Siegfried

In his operation of the Independence Daily News?

Answer 'Yes' or 'No' Yes

In his operation of The Pictorial Shopper?

Answer 'Yes' or 'No' Yes

In the operation of Radio Station KIMO from January 1, 1950 to January 1, 1953?

Answer 'Yes' or 'No' Yes

In the operation of Radio Station KIMO from January 1, 1953 to December 12, 1957?

Answer 'Yes' or 'No' Yes

If you find monopoly power was resident in The Kansas City Star Company, or that The Kansas City Star Company and Emil A. Sees attempted to achieve or build a monopoly, and that either or both such matters were a

substantial and proximate cause of damage to the plaintiffs' several businesses, then make answer to the following:

Was the paid circulation of The Independence Daily News substantially and proximately reduced or retarded thereby?

Answer 'Yes' or 'No' No

Was the advertising revenue of The Independence Daily News substantially and proximately depreciated or retarded thereby?

Answer 'Yes' or 'No' Yes

If your answer is 'yes' to either one of the last two above questions, in what amount, measured in dollars and cents, do you find from the evidence The Independence Daily News was damaged?

State such amount; or, 'None' in the following blank space according to your finding:

Speculative

Was the paid circulation of The Pictorial Shopper substantially and proximately reduced or retarded thereby?

Answer 'Yes' or 'No' No

Was the advertising revenue of The Pictorial Shopper substantially and proximately depreciated or retarded thereby?

Answer 'Yes' or 'No' Yes

If your answer is 'Yes' to either one of the last two above questions, in what amount, measured in dollars and cents, do you find from the evidence The Pictorial Shopper was damaged?

State such amount; or, 'None' in the following blank space according to your finding:

Speculative

Was the advertising revenue in the operation of Radio Station KIMO, during the period from January 1, 1950 to January 1, 1953, substantially and proximately depreciated or retarded thereby?

Answer 'Yes' or 'No' Yes.

Was the advertising revenue in the operation of Radio Station KIMO, during the period from January 1, 1953 to December 12, 1957, substantially and proximately depreciated or retarded thereby?

Yes.

If your answer is 'Yes' to either one of the last two above questions, in what amount, measured in dollars and cents, do you find from the evidence Radio Station KIMO was damaged?

State such amount; or, 'None' in the following blank space according to your finding:

Speculative.

All twelve jurors must agree on each answer, affirmative or negative, that you make to each of the above interrogatories.

(Signed) Charles F. McCall
Foreman of the Jury."

No. 704.

IN THE

SUPREME COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENTS IN OPPOSITION

INDEX

Opinions Below 1
Jurisdiction 2
Question Presented 2
Constitutional Provisions, Statutes and Rules Involved 2
Statement 3
Argument 10
Conclusion 15

Appendix—

Section 2 of the Sherman Act 16
Section 4 of the Clayton Act 16

Citations

Cases—

Bailey, Admrx., v. *Central Vermont Ry., Inc.*, 319 U.S. 350 13
Bigelow v. *R.K.O. Radio Pictures, Inc.*, 327 U.S. 251 13
Eastman Kodak Co. v. *Southern Photo Materials Co.*, 273 U.S. 359 13
Lavender v. *Kurn*, 327 U.S. 645 13
Quercia v. *United States*, 289 U.S. 466 12
Senko v. *LaCrosse Dredging Corp.*, 352 U.S. 370 13
Tennant, Admrx., v. *Peoria & Pekin Union Ry. Co.*, 321 U.S. 29 13
United States v. *Philadelphia & Reading R. Co.*, 123 U.S. 113 12

Constitutional Provisions, Statutes and Rules—

Amendment VII to the Constitution of the United States 2
Section 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C.A., Section 2 2, 3, 16
Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C.A., Section 15 2, 3, 16
Rule 38(a) of the Federal Rules of Civil Procedure 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 704.

CRAIG SIEGFRIED, As a Sole Proprietor and As a Partner in The Blue Valley Company, a Partnership Composed of Craig Siegfried, Cedric Siegfried, Charles M. Siegfried and Frank E. Fowler,

Petitioner,

vs.

THE KANSAS CITY STAR COMPANY, a Corporation, and EMIL A. SEES,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW.

The opinion of the Court of Appeals for the Eighth Circuit is not yet officially reported but is printed as Appendix A to the Petition at pages A1-A16.

The opinion of the District Court is reported at 193 F. Supp. 427.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). The judgment of the Court of Appeals was entered January 9, 1962, no petition for rehearing was filed, and the Petition for a writ of certiorari was filed February 5, 1962.

QUESTION PRESENTED.

The only question presented by the Petition is whether the court below properly held that petitioner had been accorded his right to a trial by jury where the trial court fairly submitted the case to the jury, the jury returned special verdicts finding that petitioner had wholly failed to sustain his burden of proving the amount of his damages without resort to speculation and conjecture and that the amount of his damages was accordingly "speculative" and the trial court entered judgment for petitioner for nominal damages.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED.

The statutes involved are Section 2 of the Sherman Act and Section 4 of the Clayton Act, cited in full and quoted in the Appendix hereto, and in addition, Amendment VII to the Constitution of the United States and Rule 38(a) of the Federal Rules of Civil Procedure (cited and quoted in the Petition, p. 2).

STATEMENT.

Petitioner instituted a private civil action for damages claimed to have resulted from respondents' alleged violations of Section 2 of the Sherman Act (15 U.S.C.A., Sec. 2). Petitioner published a daily newspaper and a weekly throw-away shopper publication in Independence, Missouri, and owned and operated a daytime-only radio station in the same city. Respondents, during the period involved, published a daily newspaper in Kansas City, Missouri, and owned and operated a radio and television broadcasting station in that city. Petitioner contended that respondents injured him in his business and property and instituted suit pursuant to Section 4 of the Clayton Act (15 U.S.C.A., Sec. 15).

Since petitioner's only present ground of alleged error relates to the form of the submission of the case to the jury, we shall limit our statement to the sequence of events occurring after the close of the trial. The case was submitted to the jury with full and comprehensive instructions covering all issues (R. 293-334), including 8 pages dealing solely with damages (R. 323-331). In the course of this charge the trial court specifically instructed the jury that if the amount of damages was speculative petitioner was entitled only to nominal damages, stating (R. 330):

> "If the fact of damage is shown to exist by a preponderance of the evidence and the amount of damage is left in conjecture, speculation or surmise, then plain-

*Since petitioner has not complied with Rule 21-2 of the Rules of this Court in notifying respondents of the contents of the record filed in this Court, respondents must assume that petitioner has filed the same record herein as was filed in the court below and all references are to that record.

tiffs can only recover nominal damages, i. e. $1.00, or some other modest sum."

At the close of the charge the case was submitted to the jury with forms calling for general verdicts (R. 332-3). Thereafter, and on the same day when the jury had deliberated some two hours, the court inquired of the foreman as to whether a verdict had been reached and, receiving a negative answer, recessed the jury until the following morning (R. 336).

The following morning and prior to the jury's resumption of deliberations the court called counsel into chambers and submitted to them copies of forms of special verdicts which it proposed to submit to the jury in lieu of the general verdict forms. Counsel were afforded full and adequate opportunity to examine the special verdict forms, to request additional interrogatories, and to except thereto if desired (R. 337). Counsel for petitioner excepted to the submission of the special verdicts and the court's alleged failure to include a special verdict relating to the claimed increased cost of circulation occasioned by respondents' failure to permit their contract carriers to distribute petitioner's publications (R. 337-8) and in accordance with petitioner's exception the court amended the special verdict forms submitted to the jury (R. 343).

The court thereupon returned to the courtroom and again inquired of the jury foreman whether any verdict had been reached in the case or any agreement had been reached on any issues, as follows (R. 338):

> "The Court: Mr. McCall, last evening you stated to me that you had not reached any verdict in the case, and I understand from that that you do not have a unanimous opinion with reference to any of the issues that you were considering. Is that correct?
>
> Foreman McCall: That is correct."

The court then withdrew the general verdict forms and submitted the special verdict forms to the jury and the jury resumed deliberations (R. 338-44).

Later in the day the jury sent the following note to the court (R. 356):

> "We are in agreement as to all questions except those questions pertaining to the amount of damages. Are there any instructions which you may properly give us to enable us to arrive at a basis to be used in determining the amount of damages? Charles F. McCall."

The court thereupon called the jury back to the courtroom and repeated its instructions with respect to damages which had been previously given (R. 348-54). The court then gave the following additional instructions to the jury (R. 354-56):

> "The evidence in the case does leave a void and I know that you have and will have a difficulty with this question of the amount of damages. But the burden of proof is upon the plaintiffs to sustain the amount of damages with some reasonable degree of certainty in the case. The law casts that burden of proof upon the plaintiffs. If the plaintiffs have not sustained the burden of proof, then they are not entitled to recover more than one dollar, or some nominal sum, as damages with reference to any particular item of their business that was been damaged, if you find that it was damaged, by reason of the monopoly or the attempt to monopolize here charged.
>
> The case has been presented to you by exhibits and other matters that do not demonstrate, in my opinion—*but you are not bound by my opinion*—In my opinion, however, the case does not demonstrate the amount with a reasonable degree of certainty that the plaintiff in this case has been damaged. *That is*

my opinion. I am expressing it to you but you are not bound by it.

Follow the instructions as I have given them to you and keep those matters in mind. But the proof in the case has not established net losses from the operation of these businesses as the plaintiffs claim. There may be shown the question of the impact of damage upon those businesses of some kind, to some extent. But the evidence does not demonstrate the amount of loss. It leaves it, in my opinion, speculative and conjectural. *Now, I say this to you, and that is my opinion, but you use your own opinions and you are not to be influenced by anything that I say to you in this charge in that respect. You use your own opinions, consider the evidence.* But really there is no evidence in this record from which I, as a judge, can ascertain that amount of damages that would reasonably be recovered by the plaintiffs in this case with any reasonable degree of certainty. That is the state of the record. The record was made by the plaintiffs in that fashion.

* * *

Now, in view of the form of the verdict that I have given to you, if you find that the plaintiffs were injured in any one of their business operations by reason of the monopoly, but you cannot ascertain the amount of it, you may either put down the sum of one dollar or you may write in the word 'speculative.' *But if you write in the sum of one dollar, or any other noblest sum, all of you agree upon that particular amount. If you write in the word 'speculative' all of you agree among yourselves whether that is the state in which you are left by reason of the proof in the case.*

If you do that, then there are questions of law which that will indicate to the Court to pursue under the law. That would be an aid to the Court in this case. If you are left in that state of mind and you can't ascertain the amount of damages and you think

that it is speculative, either write the sum of one dollar or put the word 'speculative' so that the Court will have an indication of what your collective mind is with reference to that particular subject." (Emphasis ours.)

Thus, while the court in the supplemental charge expressed its opinion as to the state of the evidence on damages, on three occasions therein it also informed the jurors that they were not bound by the court's opinion. They were further informed that if they wrote in the word "speculative" as to the amount of petitioner's damages in the special verdict forms, all must agree upon that verdict.

Thereafter, the jury returned to the courtroom and reported that it had reached a verdict. The jury found that petitioner suffered no loss of circulation revenues and that any damages suffered by petitioner with respect to advertising revenues were "speculative." (R. 29-32.)

After reading and receiving the verdicts, the court stated (R. 358):

> "The Court: I think it is a very fine verdict for you to return and *it will be a verdict from which the Court can make applications of law.* It gives to me a pattern from which to finally determine this case. Of course there will be other matters that will be submitted to the Court, notwithstanding your verdicts here, but it will give me a pattern, and your thoughts are very, very helpful.
>
> "I will say to you that I have worked with this case for two years and had at least 10 pretrial conferences in the case, and it has been a difficult matter. But your verdict cuts out a lot of cobwebs in the case and now gives me a clean pattern to work on, and I am very thankful to each one of you for it." (Emphasis ours.)

Thereafter, the court requested counsel to file motions as to the form of judgment to be entered on the verdicts (R. 33). Petitioner responded by requesting the court to grant a trial *de novo* on all issues, or, in the alternative, to grant a new trial on the issue of damages alone on the ground that the jury's answers to the special verdicts dealing with the amount of damages were no answers at all (R. 34-39). Respondents moved for the entry of judgment in favor of petitioner for nominal damages on the ground that petitioner did not sustain his burden of proving the amount of his damages without resorting to speculation and conjecture (R. 40-46). The court entered judgment for petitioner for one dollar on each of four counts, which was trebled (R. 71-75). The District Court, in addition, wrote an opinion setting forth his views of the evidence and the law (193 F. Supp. 427; R. 47-71).

Petitioner appealed to the Court of Appeals, which affirmed the judgment of the District Court. With respect to the sole contention raised herein, that petitioner was allegedly deprived of his right to a jury trial, the court below stated (Petition, pp. A10-A11):

> "It seems clear to us from the court's instructions as a whole, including the supplemental instructions, that the court in effect instructed the jury that if they found that the plaintiff had not met the burden of proving any ascertainable actual damages, they should allow the plaintiff only nominal damages and that such verdict could be expressed by filling in the blanks provided for the amount of verdict with the words '$1.00' or 'speculative', and that the jury so understood the court's instructions, and that the jury by filling in the amount blanks with the word 'speculative' expressed their collective view that plaintiff was entitled to no substantial damages but only to nominal damages.

It appears from plaintiff's exception to the additional instructions on damages that he also understood the instructions. Such exception reads:

> 'The plaintiffs wish to object and except to the the additional oral instructions given by the Court to the jury, in that it invades the province of the jury, having the effect of directing the jury in the amount of damages to return on each count of the plaintiffs' petition, that amount being one dollar.'

We conclude that the jury's special verdicts reflect their decision that the plaintiff was entitled to only nominal damages. *Thus the court in entering judgment for $1.00, trebled, on each count was only entering judgment on the special verdicts of the jury. Plaintiff's claim that the court usurped the function of the jury and fixed the amount of damages independently of the verdicts is without merit. Plaintiff has not been denied a jury trial on the damage issue.*

Plaintiff contends that even if the court had authority to fix the amount of damages, there is no evidentiary basis for a finding that plaintiff failed to produce proof whereby the jury could have made a reasonable estimate of the amount of damages. *The answer is that the jury, not the court, made the finding that plaintiff had not established his right to recover substantial damages.* It is true that the court was of the view that the plaintiff had not offered evidence from which the amount of damages could be reasonably estimated, but *the court submitted the issue of damages to the jury and received their answer that such damages were speculative.* Since the jury determined upon the basis of all the evidence that plaintiff was not entitled to substantial damages, we see no need for passing upon defendants' motion for a directed verdict on the substantial damage issue. In any event, the evidence on damages, so well summarized in the trial court's opinion, affords a reasonable

basis for the jury as a fact-finder to reach a permissible conclusion that the plaintiff is entitled to no substantial damages." (Emphasis ours.)

ARGUMENT.

We cannot read petitioner's mind, but at best we understand his statement of the question involved it is that the trial court deprived petitioner of a trial by jury in that it "took the case from the jury by instructing them that they could either bring in one dollar damages or enter the word 'speculative'" and "the Court then sat as a jury and found as fact that petitioner was damaged in only the sum of one dollar." (Petition, p. 3). This is a gross distortion of what actually occurred and contains at least three glaring misstatements.

First, the trial court did not take the case from the jury. Rather, the jury rendered a unanimous verdict that the amount of petitioner's damages was "speculative." (R. 31-32).

Second, the trial court did not direct or instruct the jury either to bring in a verdict for one dollar or to enter the word "speculative" on the special verdict forms. The court merely advised the jury that in the court's opinion petitioner had not sustained his burden of proving any right to substantial damages without resort to speculation and conjecture. The court, however, also advised the jury not once but three times that it was not bound by the court's expression of opinion. (R. 354-56).

Third, the trial court did not sit as a jury and did not make any findings of fact on any issue. Upon receipt of the jury's verdict the court merely translated the jury's findings that the amount of petitioner's damages was spec-

ulative into a judgment for nominal damages (R. 71-75). This was a legal process, not a factual one.

Petitioner further errs in attributing either clairvoyance or misconduct to the trial judge in contending as he does that the judge when he gave the supplemental instructions of which petitioner complains, "knew that the jury had already made a positive finding of substantial damages." (Petition, p. 5).... Petitioner, in the same vein, also complains that the trial judge directed the jurors to write in the word "speculative" when they showed signs of disagreement on the amount of damages (Petition, p. 7). These unfounded, unwarranted and unsupported assertions can be given no credence whatever. Neither the court nor counsel were advised nor knew at any time prior to the rendition of the verdict as to the jurors' views on any issue. Petitioner's baseless inferences to the contrary have no foundation whatever.

Actually, petitioner's entire position is founded upon the untenable premise that the trial court took the case from the jury and directed the jury to return a verdict finding that petitioner's damages were speculative. From this petitioner concludes that he was denied a jury trial. However, with the premise failing, the conclusion must also fail. Contrary to petitioner's assertions, the facts are that (1) The court specifically informed the jury in its supplemental instruction that it was not bound by the court's expression of opinion (R. 354-5); and (2) The jury returned a unanimous verdict finding that petitioner had failed in his proof of damages (R. 29-32).

The truth of clause (1) immediately above is manifested throughout the charge, despite petitioner's studied attempts to conceal it. For example, immediately preceding the first sentence quoted by petitioner in his Statement (Petition, p. 5), the trial court stated (R. 355):

> "Now, I say this to you, and that is my opinion, but you use your own opinions and you are not to be influenced by anything that I say to you in this charge in that respect. You use your own opinions, consider the evidence."

In another place in this same charge the court told the jury that, "You are not bound by my opinion * * * I am expressing it to you but you are not bound by it." (R. 354). In the court's preceding general charge to the jury it also advised the jurors that they were not bound by any expression of the court's opinion on any factual issues (R. 296, 321). The jury was thus fully advised that it was not bound by the court's expression of opinion.*

The truth of clause (2) above is equally apparent. In addition to being instructed that they were not bound by the court's expression of opinion, the jurors were also instructed that their verdict must be unanimous and that they could write in the word "speculative" in respect to the special verdicts dealing with quantum of damages only if they were agreed that "that is the state in which [they were] left by reason of the proof in the case." (R. 355). The jury in reaching its verdict was in unanimous agreement that petitioner did not sustain his burden of proof upon the issue of damages. As the court below held, "the jury by filling in the amount blanks with the word 'speculative' expressed their collective view that [petitioner] was entitled to no substantial damages but only to nominal damages." (Petition, p. A10). The trial court did the only thing it could have done under the circum-

---

*This Court has uniformly held that federal judges are not mere moderators, but are entitled to express opinions upon the evidence. *United States* v. *Philadelphia & Reading R. Co.*, 123 U.S. 113, 114 (1887). *Quercia* v. *United States*, 289 U.S. 466, 469 (1933). And when they do so no court has ever held that they are thereby directing verdicts.

stances and translated the jury's finding that petitioner's damages were speculative into a judgment for nominal damages.*

The court below held that there was a reasonable evidentiary basis for the jury's finding that petitioner's damages were speculative (Petition, p. A11). Since petitioner does not challenge this ruling it must be accorded finality.** The conclusion is thus inescapable that there is no basis for review of the decision of the court below by this Court.

While petitioner makes a superficial attempt to contort this case into one of far-reaching impact and consequence, try as he may he cannot deny the one fact crucial to his position: he had the jury trial he demanded upon all issues

---

*This Court has consistently held that speculative damages may not be recovered in private antitrust suits. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927); *Bigelow v. R.K.O. Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946).

**In *Lavender v. Kurn*, 327 U.S. 645 (1946), this Court said (pp. 652-3):

> "The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury.
>
> * * *
>
> Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

Accord *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370, 373-4 (1957); *Bailey, Admrx., v. Central Vermont Ry., Inc.*, 319 U.S. 350, 353-4 (1943); *Tennant, Admrx., v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 35 (1944).

of fact, including those bearing on damages, and the jury returned a verdict against him. The trial court so recited stating (193 F. Supp. 438):

> "The jury rendered a verdict stating that in its opinion the evidence of damages was too speculative to be ascertained with a reasonable degree of certainty. Specifically, the jury found that plaintiff Craig Sportsteel suffered no damage with respect to alleged loss of circulation revenues and the loss suffered by plaintiffs with respect to advertising revenues was found to be speculative. Consequently, plaintiffs have compiled a record in this case which in both the Court's opinion and the jury's opinion, expressed by the verdict of the jury, made a recovery of damages by plaintiffs impossible to ascertain with a reasonable degree of certainty. Plaintiffs have accordingly failed to sustain their burden of proof and are entitled to no more than nominal damages."

The Court of Appeals agreed, stating (Petition, p. A10):

> We conclude that the jury's special verdicts reflect their decision that the plaintiff was entitled to only nominal damages. Thus the court in entering judgment for $1.00, trebled, on each count was only entering judgment on the special verdicts of the jury. Plaintiff's claim that the court usurped the function of the jury and fixed the amount of damages independently of the verdicts is without merit. Plaintiff has not been denied a jury trial on the damage issue.

We submit that no other conclusion is either appropriate or possible on this record. Analysis shows that petitioner was accorded a jury trial, that the jury reached a permissible verdict, that the court entered appropriate judgment thereon, and that nothing remains for review by this Court. Petitioner's reliance upon such stereotyped phrases as "subtle erosion of the Constitutional right to trial by jury" (Petition, p. 8), and "trend of conservatism

and reluctance by the Federal Courts * * * in sustaining awards of substantial amounts of damages" (Petition, p. 8) as grounds for invoking this Court's jurisdiction, do not give substance to petitioner's wholly superficial and unfounded contentions. This Court will not be misled by these baseless assertions.

CONCLUSION.

The decision below is correct, there is no conflict of decisions, and no other reason appears for review by this Court. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CARL E. ENGGAS,
COLVIN A. PETERSON, JR.,
Attorneys for Respondents

Of Counsel:

WATSON, ESS, MARSHALL & ENGGAS,
Kansas City, Missouri,
February, 1962.

APPENDIX TO RESPONDENTS' BRIEF.

Pertinent Statutes

Section 2 of the Sherman Act of July 2, 1890, c. 647, 26 Stat. 209, 15 U.S.C.A., Section 2, reads as follows:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C.A., Section 15, reads as follows:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."